REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 75 of 2011

(An appeal from the Decree and Judgment of the Honourabel H. I. Ong'udi, CM datecd 28th October, 2009 in Civil Suit No. 228 of 2003)

B E T W E E N

ALFRED OMUKHOBERO ..... APPELLANT

VERSUS

SAMSON WANYAMA WEKESA ..... RESPONDENT

JUDGMENT

The appellant filed a civil case before the subordinate court through a plaint dated 25th April 2003. He was the plaintiff. He served the respondent (defendant). The case was in respect of a road traffic accident which occurred along the Kakamega - Mumias road on 27th July 2000. It was his claim that he was riding a motor cycle from the Kakamega direction when the respondent emerged driving a motor vehicle registration KWP 819 from the opposite direction. That the respondent drove the said motor vehicle negligently and knocked the appellant causing him serious injuries. The appellant, as a consequence, filed the case claiming general damages, specials of Kshs.4350/=, costs of the suit and interest at court rates. The respondent filed a defence denying several allegations in the plaint. He denied ***inter alia*** ownership of the vehicle and that the same knocked down and injured the appellant and put the plaintiff to proof thereof.

The appellant called three witnesses at the trial who testified, including himself. The respondent only called one witness to testify, who was himself. After the trial, the court delivered judgment dismissing the plaintiff's suit with costs. Therefrom, the appellant (plaintiff) filed this appeal through a memorandum of appeal listing six grounds of appeal, through his counsel M/S L. M. Ombete & Company. The grounds of appeal are as follows –

1. That the learned Chief Magistrate grossly erred in law and fact by holding that since the appellant did not have what he called an eye witness to the accident that therefore his evidence was worthless and could not be evaluated ***vis a vis*** that of the respondent.

2. That the learned Chief Magistrate grossly erred in law and fact in failing to recognize that a fact in issue can be proved by the evidence of a single witness and that a plaintiff is just a witness like any other person.

3. That the learned Chief magistrate grossly erred in law and fact by implying that a plaintiff cannot be an eye witness.

4. That the learned Chief Magistrate grossly erred in law and fact by failing to appreciate that a collision by a motorist and a cyclist in the circumstances of this case could not be wholly blamed on the cyclist.

5. That the learned Chief Magistrate grossly erred in law and fact by failing to apply the principle of ***res ipsa loquitar*** in this case on which she would have found the respondent to blame for the accident.

6. The learned Chief Magistrate's judgment is totally against the weight of evidence.

The counsel for the parties M/S L. M. Ombete & Company for the appellant and M/S E. K. Owinyi & Company for the respondent filed written submissions, which I have perused. The counsel who appeared in court on the hearing date, Mr. Anziya for the appellant and Mr. Nyikuli for the respondent relied upon the written submissions filed.

This is a first appeal. As a first appellate court, I am duty bound to reconsider the evidence afresh and come to my own conclusions – *see* ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123***.

I have re-evaluated the evidence on record afresh. The appellant's appeal rests on the alleged application by the trial court of the wrong standard of proof in civil cases, instead of weighing the appellant's evidence against the respondent's evidence and determining the case on the balance of probabilities. It is also alleged that the learned magistrate misdirected herself by failing to appreciate that even if the appellant was contributorily negligent to some extent, the respondent could still be found liable in negligence. The learned trial magistrate, in the appellant's view, also misdirected herself by coming to the conclusion that the plaintiff was not an eye witness.

Having perused the evidence on record, I find that there were eye witnesses who testified on the accident. It was the appellant (the plaintiff at the trial) and the respondent (the defendant at the trial). Though the evidence was that the respondent carried two passengers in the motor vehicle which he was driving, and that there was a crowd which almost lynched him, no other eye witness was called to testify on either side.

The learned trial magistrate correctly stated the position of the evidence tendered when she stated in the judgment –

"There is no dispute that the vehicle belongs to the defendant and it was driven by him.

The issue is who is to blame.

The plaintiff has given his version of what happened and so has the defendant."

Beyond this however, the learned trial magistrate did not evaluate the evidence on both sides and come to conclusions on who is to blame. In civil cases, the burden is on the plaintiff to establish a case on the balance of probabilities.

It is also trite that an appellate court will be slow to interfere with the finding of fact of a trial court – se ***Ephantus Mwangi & Anor. Vs Duncan Mwangi Wambugu [1982-88] I KAR 278***.

Considering the evidence on record and pleadings filed, I am of the view that the appellant's evidence on how the accident occurred was more believable than that of the respondent with regard to establishing negligence. Firstly, the respondent denied many matters of fact in the pleadings (defence) which he willingly admitted during evidence. These are, ***inter alia***, the denial of ownership of the motor vehicle and that he was driving the same. Taking into account that a litigant is bound by his pleadings, in my view his contradicting positions on obvious facts makes him an unreliable person, and one whose evidence was not easily believable. Secondly, he stated that he was driving at 65 km per hour in an area in

which he admitted in evidence there was a speed limit of 50 km per hour. Thirdly, the evidence from the respondent himself that he was about to be beaten by a crowd shows that the area was crowded, hence no reasonable driver would have been driving at a high speed. In my view, in the absence of any other evidence of an eye witness to the accident, what is on record tilts the pendulum in favour of the appellant. With the evidence on record, I find that the appellant proved his case of negligence against the respondent on the balance of probabilities. However, because he also did not bother to call any eye witness or the police who visited the scene to come to court and testify as to how the accident might have occurred, I will give a benefit to the respondent by finding the appellant contributorily negligent to the tune of 20%. In conclusion, I disagree with the findings of facts of the learned trial magistrate as stated above. I note that the learned magistrate assessed general damages at Kshs.450,000/=.

Consequently, I allow the appeal and set aside the decision of the learned trial magistrate. In its place I enter judgment for the appellant and award damages to the appellant as follows –

1. General damages Kshs.450,000/= less 20%.

2. Special damages Kshs.4,350/= less 20%.

The appellant is also awarded costs of the lower court and of the appeal less 20% contribution.

Dated and delivered at Kakamega this 23rd day of May, 2013

George Dulu
J U D G E